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General Aspects of the Functioning of the ECHR System

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE RULE OF PRIOR EXHAUSTION OF DOMESTIC REMEDIES IN INTERNATIONAL LAW

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1. INTRODUCTION

When studying the application of the rule on exhaustion of internal remedies by the European Court of Human Rights (“the European Court”) in the light of general norms, it is important to make two preliminary remarks. In the first place, the European Court’s case law¹ is a source of primary importance for interpreting the rule on exhaustion of internal remedies under general international law. In second place, and more generally, human rights doctrine has influenced diplomatic protection, i.e. the main field of general international law where the rule on exhaustion is applied, to the point that, to quote the International Court of Justice, “the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of the treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights”.²

It should be stressed, however, that general international law has not remained static in the field of exhaustion of internal remedies, solely drawing inspiration from international human rights mechanisms in general and the European Convention on Human Rights (“the European Convention”) in particular. General international law has been moving forward even in the field of the drawing up of written sources. I am of course referring to the well known and long-awaited Draft Articles on Responsibility of States³ and even more so, the subsequently adopted Draft Articles on Diplomatic Protection.⁴

Generally speaking, the principles that govern exhaustion of internal remedies under general international law coincide to a very large extent with those that are found within the European system. The local remedies rule is “an important princi-

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¹ This was actually already the case for the European Commission of Human Rights’ case law.

² *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment on preliminary objections of 24 May 2007, para. 39. On whether benefiting from diplomatic protection is as such a human right, see KOOIJMANS, “Is the Right to Diplomatic Protection a Human Right?”, in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Vol. III, Napoli, 2004, p. 1975 ff.

³ Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001 and of which the United Nations General Assembly took note by Resolution 56/83.

⁴ Adopted by the International Law Commission in 2006, at its Fifty-Eighth session.

ple of customary international law”, to quote the International Court of Justice.⁵ In its general form it applies in the field of State responsibility and reiterates the key elements that all those who are familiar with the Strasbourg Court’s case law will easily recognise: (i) only those local remedies which are available and effective have to be exhausted before invoking the responsibility of a State; and (ii) the mere existence on paper of remedies under the relevant internal law does not require the use of a such remedy if it offers no possibility of redressing the situation, for instance where it is clear from the outset that the law which the local court would have to apply would lead to the rejection of the claim.

Article 44, subparagraph b), of the Draft Articles on State Responsibility, the text of which only speaks of “available and effective” local remedies, does not go beyond the essence of the rule. Not surprisingly, it is in the field of diplomatic protection that we find more developed rules on the obligation to exhaust internal remedies. Indeed, both the Draft Articles on Diplomatic Protection and the practice in this area offer the most useful and interesting elements for assessing the relationship between the European Court’s interpretation and international norms.

However, notwithstanding the fact that Article 35, paragraph 1, of the European Convention still stipulates that the rule on exhaustion of internal remedies is interpreted, within the European system, “according to the generally recognised rules of international law”, one may wonder whether general international law can nevertheless contribute to the European system.

2. PECULIARITIES OF THE INTERPRETATION OF THE RULE BY THE EUROPEAN COURT

The European Court’s interpretation of the rule presents some peculiarities that result not only from the richness and sophistication of the related case law but also from the specific needs of the European system. Two basic features characterise the interpretation of the rule in the European Convention system: (i) the importance of the principle that the local remedies rule encompasses, i.e. the subsidiarity principle; and (ii) a general trend of the European Court towards interpreting the rule in favour of the individual.

According to the first point, it is well known that the subsidiarity principle, which is the corollary of the local remedies rule in the European system and in most

⁵ See for example *Case Concerning Elettronica Sicula SpA (ELSI) (United States v. Italy)*, Judgment of 20 July 1989, ICJ Reports, 1989, para. 50. This has also been confirmed by the International Law Commission in the context of its work on State Responsibility: see Article 22 on First Reading, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* and corrigendum (A/51/10 and Corr. 1), chap. III D1, and commentary to Article 44 on Second Reading, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10), pp. 304-307.

human rights protection systems, is actually much more than a procedural rule: it is a cornerstone of the entire system. It not only defines the European Court's subsidiary role but also the national courts' primary role as the first outpost for human rights protection. In other words, it underlines the role that national courts, and the legislator, ought to play in most cases and which is never emphasised enough in the field of human rights: prevention.⁶ Aside from a very limited set of cases, in respect of which the European Court itself plays a crucial preventive role (first and foremost in the field of deportation of aliens and extradition), Article 1 of the European Convention calls first of all upon national courts to secure to everyone within the State's jurisdiction the rights and freedoms guaranteed by the European Convention and its Protocols. One of the main consequences is that the right to an effective remedy, embodied in Article 13 of the Convention, has become another cornerstone of the European system: the operating of the local remedies rule is directly dependent on the existence of remedies, which Article 13 is meant to promote.

In spite of the increasing emphasis that the European Court itself has placed on being a subsidiary court – because the European Convention can in very many cases be best safeguarded at national level and also because the European Court cannot cope with the volume of cases it is confronted with – it is fair to say that generally speaking, this has not, at least so far, prevented the European Court from developing a pro-victim case law when interpreting the local remedies rule. To quote the European Court: “the application of the rule must make due allowance to the fact that it is being applied in the context of machinery for the protection of human rights [...]. Accordingly, it [...] must be applied with some degree of flexibility and without excessive formalism”. The flexibility which the Court showed in the judgment from which this quotation is extracted, concerning the destruction of the applicants' houses in the South-East of Turkey, is particularly noteworthy.⁷

In some areas there is a distinct difference in terms of the European system being more clearly individual-oriented. I refer, for example, to the issue of the burden of proof, which in the field of diplomatic protection is reversed and incumbent on the applicant first.⁸ I refer also to extraordinary remedies, the exhaustion of which is normally considered as falling outside the scope of Article 35, paragraph 1, of the Convention,⁹ whereas the Draft Articles on Diplomatic Protection, by referring to

⁶ See, in this sense, one of our earliest studies: BULTRINI, “Il meccanismo di protezione dei diritti fondamentali istituito dalla Convenzione europea dei diritti dell'uomo. Cenni introduttivi”, in NASCIBENE (ed.), *La Convenzione europea dei diritti dell'uomo. Profili ed effetti nell'ordinamento italiano*, Milano, 2002, pp. 7-11.

⁷ *Akdivar and Others v. Turkey*, Application No. 21893/93, Judgment of 16 September 1996, para. 69.

⁸ Compare International Court of Justice, *Diallo*, cit. supra note 2, para. 44, and *ELSI*, cit. supra note 5, para. 53 on the one hand, and European Court of Human Rights, *Preminey v. Russia*, Application No. 44973/04, Judgment of 10 February 2011, para. 64, on the other hand.

⁹ *Salman v. Turkey*, Application No. 21986/93, Judgment of 27 June 2000, para. 85.

old case law of the European Commission of Human Rights, still stresses that “the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress”.¹⁰

The fact that in some areas the European system is more victim-oriented is not only understandable but also in line with general norms, which do not of course object to a specialised human rights convention system providing a more “liberal” interpretation of the rule. Furthermore, as it has been recently noted,¹¹ not only might this in turn further influence the evolution of the norms in the field of diplomatic protection, but it could be argued that in the field of human rights specific norms have developed.

3. SIMILARITIES BETWEEN THE INTERPRETATION OF THE RULE BY THE EUROPEAN COURT AND ITS SCOPE IN THE FIELD OF DIPLOMATIC PROTECTION

Despite the above, in other areas there are evident similarities between some of the criteria that are used by the European Court and those that are resorted to in the field of diplomatic protection. For example, in the field of diplomatic protection the injured alien is not required to approach administrative authorities in the exercise of their discretionary powers.¹² For the alien to satisfy the local remedies requirement it is sufficient that the essence of the claim has been brought before the competent tribunals; remedies must be accessible, and the injured alien is excused from the obligation to exhaust internal remedies when these are obviously futile, offer no reasonable prospect of success (for example when there is a consistent and well-established line of adverse precedents) or provide no reasonable possibility of effective redress (for example when the local courts do not have the competence to effectively address the matter).¹³

It is not by chance that these criteria echo those that are found in the European Court’s case law, since partly, as has already been noted, the Draft Articles on Diplomatic Protection drew inspiration from that case law. Even the European Court’s case law insisting on the applicants’ obligation to make an attempt to use local remedies notwithstanding doubts as to whether they would be apt to address the alleged violation is in fact in line with the standards resulting from the general norms. The commentary to the Draft Articles on Diplomatic Protection clarifies

¹⁰ Para. 4 of the Commentary to Article 14 of the Draft Articles on Diplomatic Protection.

¹¹ PISILLO MAZZESCHI, *Esaurimento dei ricorsi interni e diritti umani*, Torino, pp. 38-39 and 233-234. The latter extensively covers the issues that are dealt with in the present article. See also PUSTORINO, “Recenti sviluppi in tema di protezione diplomatica”, RDI, 2006, p. 68 ff., especially pp. 95-100.

¹² Such as in the case of an application for grace: see e.g. International Court of Justice, *Diallo*, cit. *supra* note 2, para. 47.

¹³ See the Commentary to Article 15 of the Draft Articles on Diplomatic Protection.

that in order to meet the requirements granting an exception to the local remedies rule, it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly.¹⁴ This actually raises a question as to whether in some cases the interpretation of the rule in the sense of requiring exhaustion even if there is a doubt does not lead to *in dubio pro imperio* rather than *in dubio pro vitimae*. This impression is particularly strong when the European Court, does not give reasons for rejecting the applicants' arguments on the inability to use a given domestic venue and implicitly accepts the Government's arguments, as occurred in a recent case.¹⁵ It is true that assessing the availability and effectiveness of local remedies is often a case-by-case exercise, closely linked to the specific circumstances of each case.¹⁶ However, despite this, a lack of reasoning for rejecting the applicant's arguments does not help overcome the criticism of those who consider that the practical application of the local remedies rule "is one of the most unpredictable issues in international human rights litigation".¹⁷

Nor can we consider as problematic the fact that in a number of cases the European Court has contented itself with internal remedies of a purely compensatory nature.¹⁸ This may be disappointing and some scholars clearly advocate that for many human rights violations purely compensatory internal remedies are insufficient and restitution ought to be required.¹⁹ However, on the one hand the European Court's jurisprudence still accepts purely compensatory remedies with a few exceptions,²⁰ and on the other hand the general norms, at least at the present

¹⁴ *Ibid.*, para. 4.

¹⁵ *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, Decision of 30 June 2009.

¹⁶ A circumstantial assessment to be made by the competent international tribunal, as the commentary to Article 15 of the Draft Articles on Diplomatic Protection suggests.

¹⁷ SCHEININ, "Access to Justice before International Human Rights Bodies", in FRANCONI (ed.), *Access to Justice as a Human Right*, Oxford, 2007, p. 139.

¹⁸ See, e.g., *Knebl v. the Czech Republic*, Application No. 20157/05, Decision of 3 March 2009, and *Nagovitsyn and Nalgiyev v. Russia*, Applications No. 27451/09 and 60650/09, Decision of 23 September 2010.

¹⁹ In this sense see especially PISILLO MAZZESCHI, *cit. supra* note 11, p. 177; the latter also quotes POCAR, "Epuisement des recours internes et réparation en nature ou par équivalent", in *Le droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago*, Vol. III, Milano, 1987, p. 291 ff., as well as MUMMERY, "The Content of the Duty to Exhaust Local Judicial Remedies", *AJIL*, 1964, pp. 401-402. Against the assumption that it may be acceptable that local remedy be preventive or compensatory, it could be argued that the practice at national level may be developing in favour of the remedial/preventive character of remedies. A number of interesting points on this can be found in SHELTON, *Remedies in International Human Rights Law*, Oxford, 2006.

²⁰ The most notable of which is probably to be found in the field of deportation of aliens and of extradition: an internal remedy is not considered to be effective if it does not have automatic suspensive effect, therefore a preventive/remedial nature, taking account of the high risk of irreversible prejudice that the execution of this sort of measures poses: see, among many others,

stage, are of no help (the Draft Articles on Diplomatic Protection and its commentary are silent on this point).

The treatment by the European Court of estoppel, with regard to raising an exception for non-exhaustion of internal remedies, also appears to be in line with the general norms, which are actually not very precise apart from allowing conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.²¹

4. DISTINCT INTERNATIONAL RESPONSIBILITY ASPECTS IN THE FIELD OF DIPLOMATIC PROTECTION (AND OF INTER-STATE APPLICATIONS BEFORE THE EUROPEAN COURT)

Some features of the general norms are specific to the dimension of international responsibility. For example, the problem of establishing whether a claim in the field of diplomatic protection is direct, indirect or mixed, i.e. whether the preponderant element is the injury to the State or the injury to its national or whether both are present. If the direct element (i.e. the injury to the State) is preponderant, then the exhaustion of internal remedies rule will simply not apply and the matter will fall entirely within the sphere of international responsibility.²² In passing, however, it is worth noting some interesting analogies. In the European Convention, inter-State applications before the European Court would normally include an indirect element, i.e. an injury to the individual. The Court has recently reiterated that the rule of exhaustion of domestic remedies applies to State applications (Article 33 of the European Convention) “in the same way as it does to ‘individual’ applications (Article 34), when the applicant State does no more than denounce violations allegedly suffered by ‘individuals’ whose place, as it were, is taken by the State. On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice”.²³ It might be argued that under the latter circumstances an inter-State application and diplomatic protection actually coincide.²⁴

Gebremedhin v. France, Application No. 25389/05, Judgment of 26 April 2007, paras. 58 and 67.

²¹ See paras. 12-17 of the Commentary to Article 15 of the Draft Articles on Diplomatic Protection.

²² See paras. 10-12 of the Commentary to Article 14 of the Draft Articles on Diplomatic Protection.

²³ *Georgia v. Russia*, Application No. 13255/07, Decision of 30 June 2009, para. 40.

²⁴ In this context cf. FORLATI, “Protection diplomatique, droits de l’homme et réclamations ‘directes’ devant la Cour internationale de justice. Quelques réflexions en marge de l’arrêt Congo/Ouganda”, RGDIP, 2007, p. 89.

Another issue that is specific to diplomatic protection concerns the existence of a requirement of a relevant connection between the injured person and the State: the Draft Articles on Diplomatic Protection do not endorse the requirement of a voluntary link, i.e. something more than an objective connection between the person and the State.²⁵ In the field of human rights it is hard to imagine a situation whereby the individual would be dispensed from exhausting internal remedies because he or she did not voluntarily submit himself or herself to the accused State's jurisdiction. After all, the European Court's case law requires exhaustion even where the alleged victims, for example, are aliens who were deported and live, after the injury has occurred, in their own third country: they are normally required by the European Court to hire a legal counsel in the respondent State in order to exhaust domestic remedies.²⁶

5. CAN THE INTERPRETATION OF THE RULE BY THE EUROPEAN COURT BE QUESTIONED AT ALL?

At the end of the day, there seems to be only one point which may raise a real issue of compatibility with the general norms – but it is a rather important one. Among the exceptions to the local remedies rule, Article 15 of the Draft Articles on Diplomatic Protection includes the situation where “(t)here is undue delay in the remedial process which is attributable to the State alleged to be responsible”. This principle is corroborated by a robust set of normative and practical elements, in particular by a number of judicial decisions and by specific provisions in some important human rights treaties: it is worth mentioning, in this regard, Article 5, paragraph 2(b), of the International Covenant on Civil and Political Rights (“unreasonably prolonged”), Article 46, paragraph 2(c), of the American Convention on Human Rights (“unwarranted delay”), and Article 56, number 5, of the African Charter for Peoples' and Human Rights (“unless it is obvious that this procedure is unduly prolonged”). Unlike the other main international human rights instruments, and unlike the Draft Articles on Diplomatic Protection, the European Convention does not contain a similar provision. It is true that such an exception – local remedies becoming at some point ineffective because of their length – is sketched out in some decisions, particularly by the former European Commission of Human Rights. The European Court, however, has devoted little attention to this exception and appears to adopt a very cautious approach.²⁷ The *Selmouni v. France* Judgment

²⁵ See paras. 8-10 of the Commentary to Article 15 of the Draft Articles on Diplomatic Protection.

²⁶ See, e.g., *Theodoros Dritsas et autres c. Italie*, Application No. 2344/02, Decision of 1 February 2011.

²⁷ In this sense see also PISILLO MAZZESCHI, *cit. supra* note 11, p. 183.

probably remains the most notable application of an exception of this sort.²⁸ One is nevertheless struck by the very prudent language used by the Court and by its emphasis that the Judgment was limited to the circumstances of the case. Of course, it is difficult to objectively define the meaning of the notion of “undue delay” or to prescribe fixed time-limits: this will inevitably have to be assessed in the light of the circumstances of each case.²⁹ In addition, one must take into account the nature of the violation complained of: the exception in question will operate differently depending on the gravity of the alleged violation at issue (a timely response by domestic remedies will be required in more stringent terms with regard, for example, to torture or child-custody cases).

The attempts by the Inter-American Court to use indicative thresholds for judging the reasonableness of the overall length of a set of domestic remedies in the context of the local remedies rule are worth noting.³⁰ It is true that in many cases the latter court is confronted with dramatic delays that actually go beyond the mere procedural aspect and lead to a substantive denial of justice. Nevertheless, the technique used by the European Court in *Selmouni*, i.e. assessing the authorities’ diligence by analysing each procedural segment and the related delays and referring to the concept of “positive measures” instead of the lengthy response as such, may amount, in the author’s view, to diluting the essence of this exception: the examination by the national authorities has, as a whole, lasted for too long having regard to the seriousness of the alleged violation. The European Commission of Human Rights was much more explicit in giving relevance to the “length of the proceedings” and “the time which has elapsed since the events of which complaint is made”.³¹

There actually seem to be very few recent cases in which applicants have dared to apply to the European Court when the domestic proceedings were still pending or cases in which the European Court was ready to examine them at that stage. In the author’s view, when such cases are not dealt with by the Court at an earlier stage, this may have negative repercussions for the concrete impact of the European system and for the goal of improving the effectiveness of the domestic remedies that stems from the subsidiarity principle: the longer applicants wait until they raise serious issues before the European Court, the later the Court can address them and push the domestic systems to react, and the more likely it will be that similar issues will continue to arise in the meantime and that additional applications will at some

²⁸ Application No. 25803/94, Judgment of 28 July 1999. Interestingly, the European Court referred to the special circumstances that may absolve the applicant from the obligation to exhaust, “according to the generally recognised principles of international law”.

²⁹ This aspect is underlined also by the Commentary to Article 15 of the Draft Rules on Diplomatic Protection, para. 5.

³⁰ See, among others, *Las Palmeras Case*, Judgment of 4 February 2000, para. 38; *Paniagua Morales et al. Case*, Judgment of 8 March 1998, para. 155; *Suárez Rosero Case*, Judgment of 12 November 1997, para. 73; and *Genie Lacayo Case*, Judgment of 29 January 1997, para. 81.

³¹ *Erdogan and Others v. Turkey*, Application No. 19807/92, Decision of 16 January 1996.

point reach the Court. However “heretical” this might sound in the light of the subsidiarity principle of the European Court, it might be argued that the Court could elaborate a more clear approach with a view to encouraging applicants to submit applications concerning the most serious violations once the domestic proceedings have exceeded a reasonable duration.³²

In conclusion, it seems to the author that in this area, the European Court could draw inspiration from the way norms in the field of diplomatic protection are being shaped, and especially from the norms and practice within other human rights systems. This leads us to reiterate a more general conclusion.³³ Paraphrasing the European Court,³⁴ there is no water-tight division between different spheres of international norms that relate to the same matters, and constant comparisons and mutual influence can be a powerful way forward in the field of international human rights protection.

³² In the *Selmouni* case, *cit. supra* note 28, the European Court eventually dealt with the merits of the case when the domestic proceedings, against the accused policemen, were still pending (and found a violation of Article 3 of the European Convention for torture inflicted on the applicant). It might be argued that a Judgment by the European Court finding that State organs have infringed the prohibition of torture conflicts with the respect of the reputation and even of the presumption of innocence of the accused State agents where there is not yet a final domestic judgment and especially when the domestic proceedings have already permitted their identification. The question is important and deserves attention. Of course, a first answer would be that the object of the proceedings before the European Court is State responsibility and not individual responsibility of the concerned State agents. Yet this remark does not satisfactorily solve the issue of the potential, indirect consequences for individual situations of third parties who have not been granted the possibility of intervening before the European Court. The solution should be then found through adequate guarantees to keep confidential the identity of the State agents (given that the European Court does not directly deal with their personal responsibility) in the context of the proceedings at European level and all the more so at domestic level. On the other hand, the principle of the presumption of innocence (and the rights of the defence) should be taken into account, at domestic level, in the case a national court used evidence resulting from the European Court’s Judgment.

³³ See BULTRINI, *La pluralità dei meccanismi di tutela dei diritti dell’uomo in Europa*, Torino, 2004, pp. 307-330.

³⁴ *Airey v. Ireland*, Application No. 6289/73, Judgment of 9 October 1979, para. 26.

